

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7218

To be argued by
Samuel Stone.

ORIGINAL

B
P/S

United States Court of Appeals

For the Second Circuit.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

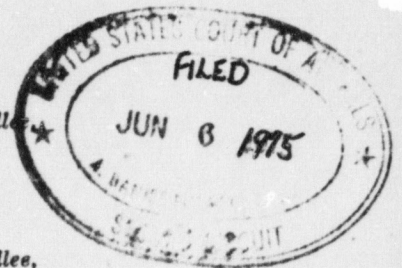
against

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

DONALD GRUSKOFF,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.



BRIEF OF DEFENDANT-APPELLANT.

SAMUEL STONE,
Attorney for Defendant-Appellant,
150 Broadway,
New York, N. Y. 10038

TABLE OF CONTENTS.

	Page
Statement	1
Facts	2
Pleadings	2
Questions	3
POINT I. The defendant-appellee, United States of America, did not sustain the burden of proof required to uphold its assertions	3
POINT II. The defendant-appellee USA failed to adduce evidence of its claim	5
CONCLUSION. The judgment of the lower court should be reversed and judgment awarded the appel- lant predicates on law and facts	6

TABLE OF CASES

	Page
Hall v. U.S. 258 F. Supp. 173	4
Aquitino v. U.S. 363 US 509, 80 S.Ct. 1277	4
US v. Durham Lumber Company, 363 US 522, 80S.Ct.1282	4
Alaska Packers Assoc. V. Industrial Acc. Com. 294 US 532, 55 S. Ct. 518, 721, L.Ed. 1044	4
McLaughlin v. Pacific Lumber Co. 293 US 351 79 L.Ed. 423	4
Pellegrino v. Nesbit 203 F 463, 37ALR(2) 1296	5
People v. Continental Illinois Bank and Trust Co. 344 Ill, 123, 176 NE 305, 75 ALR 538.	5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
PUBLIC SERVICE MUTUAL INSURANCE COMPANY

Plaintiff-Appellee

against

UNITED STATES OF AMERICA

Defendant-Appellee

DONALD GRUSKOFF

Defendant-Appellant

-----X

THE DEFENDANT-APPELLANT'S
BRIEF ON APPEAL

STATEMENT

This is an appeal from a judgment entered in the
United States District Court for the Eastern District
of New York on the 25th day of March, 1975.

FACTS

This was an interpleader action brought about by the plaintiff **appellee**, PUBLIC SERVICE MUTUAL INSURANCE COMPANY. It appears factually and the same is not controverted either by the plaintiff-appellee or the UNITED STATES OF AMERICA as the defendant appellee in this matter; that the defendant-appellant deposited the sum of \$50,000.00 with the plaintiff-appellee in small legal tender. The amount so deposited was as security or collateral on a bail bond bearing number 90 B 18 267 issued by the plaintiff-appellee for the release of one, RAYMOND DANIELS. A receipt for the said deposited money was issued to defendant-appellee, DONALD GRUSKOFF.

Thereafter, and unbeknown to the defendant-appellee, the INTERNAL REVENUE SERVICE levied against the said funds deposited as security by the defendant-appellee. The United States claiming that the funds deposited, as aforesaid, were the property of the said RAYMOND DANIELS, a delinquent taxpayer.

PLEADINGS

The plaintiff-appellee herein submitted and filed its complaint Appendix pages 61-8a. The defendant-appellant filed his answer to the said complaint, Appendix pages 9A and 10A. The defendant-appellee, UNITED STATES OF AMERICA set forth

its answer and the same is in the Appendix Pages 11a-14a.

QUESTIONS

1. Did the UNITED STATES OF AMERICA sustain the burden of proof of showing that it is legally entitled to the sum awarded by the District Court?

2. Did the UNITED STATES OF AMERICA present to the Court below evidence sustaining the claims set forth in its case?

POINT I

THE DEFENDANT-APPELLEE,
UNITED STATES OF AMERICA,
DID NOT SUSTAIN THE BURDEN
OF PROOF REQUIRED TO UPHOLD
ITS ASSERTIONS.

All of the parties herein unquestionably concede that the sole witness called at the trial was the defendant-appellant, DONALD GRUSKOFF, as a hostile witness by the defendant-appellee. See Appendix page 25a. Under such circumstances the defendant-appellee would be bound by the answers of the defendant-appellant.

A purview of the trial testimony will demonstrate the consistency of the stand taken by the defendant-appellant. This was not challenged. No one appeared to rebut the allegations of the defendant-appellant. No evidence was offered to refute the position of the defendant-appellant.

The defendant-appellee on the other hand did not offer

any evidentiary matter, except for conjectures, innuendos and suggestions on one RAYMOND DANIELS. This in fact is not evidence. Its contentions were wholly unsupported in fact and in law. It did not meet the burden of proof required under the prevailing law.

See: Hall vs. U.S 258 F Supp. 173;
Acquilino v. U.S. 363 US 509,80 S.Ct. 1277;
U.S vs Durham Lumber Company, 363 US 522,80
S. Ct. 1282.

Judge Cox, in Hall v. U.S. supra at page 174 stated that the burden is on the UNITED STATES to show that such funds are the subject of a levy.

Moreover, the burden of proof is upon the one challenging the right of the named beneficiary to cover such funds. Perhaps stated more bluntly the party upon whom the initial burden rests is the one who has the affirmative of the issue.

See: Alaska Packers Assoc. V. Industrial Acc. Com.
294 U.S. 532 55S.Ct. 518, 72L.Ed. 1044
McLaughlin V. Pacific Lumbers Co.
293 U.S. 351, 79L.ED. 423

It appears from the record that all the defendant-appellee has come forward with is a pretense of claim. However, nothing was presented in the support of such contention.

The courts have held consistently that one who intervenes in any action between other parties thereby takes the status of a plaintiff and the onus of proving the allegations set forth in complaint falls upon his shoulders. The defendant-appellee,

UNITED STATES OF AMERICA has this position. But, it neglected to adduce proof in support of the same.

See; Pellegrino V. Nesbit
203 F 463, 37 ALR(2) 1296

Moreover, if it be the State or Public as a plaintiff in a civil suit, such as the defendant-appellee, UNITED STATES OF AMERICA, either stands on the same footing in this respect as does a private litigant. Thus in a proceeding to enforce tax liability, the taxing power has the burden of proving the right to such taxes sued therefor.

See; People V. Continental Illinois Bank and Trust Co.
344 Ill 123, 176 NE 305, 75 ALR 538.

Therefore, the trial court erred in ascribing that the burden of proof was met by the government. It, anything the government substantiated the case of the appellant.

POINT II

THE DEFENDANT-APPELLEE USA FAILED TO ADDUCE EVIDENCE OF ITS CLAIM

The total testimony of the court below consisted of the testimony of appellant. The exhibits on pages 54a-59a of the appendix did not in anywise assert the evidence required to bolster its claim.

The defendant-appellee has failed to sustain the burden of proof required and in no way has proven the allegations set forth in its answer.

The Appellant is the owner of the funds. The collateral receipt set forth in the complaint duly admits him to be the owner. Nothing to the contrary was set forth. Unquestionably the funds should be returned to its rightful owner.

CONCLUSION

THE JUDGMENT OF THE LOWER COURT
SHOULD BE REVERSED AND JUDGMENT
AWARDED THE APPELLANT PREDICATES
ON LAW AND FACTS

Respectfully submitted,

SAMUEL STONE
Attorney for Appellant
Office & P.O. Address
150 Broadway
New York, New York 10038

JAMES J. CALLY
Of Counsel

UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

PUBLIC SERVICE MUTUAL INSURANCE CO

plaintiff-appellee

vs.

U, S, A.

def-appellee

and

DONALD GRUSKOFF

AFFIDAVIT
OF SERVICE
BY MAIL

State of New York, County of New York, ss.:

Harold dudash , being duly sworn deposes and says that he is
agent for Samuel Stone, the attorney
for the above named Defendant-appellant herein. That he is over
21 years of age, is not a party to the action and resides at 2346 Holland avenue , BX, NY
That on the 27th day of May, 1975 , 19 , he served the within brief of defendant-
appellant

upon the attorneys for the parties and at the addresses as specified below
Garland C. Tanks, Assistant U.S. Attorney, General Litifation section, tax division
by depositing three copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 27th
day of May, 1975 , 19

} *Harold Dudash*

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Services of three (3) copies of
the within
hereby admitted this
of

is 2 COPY RECEIVED

day, MAY 27 1975

, 197.

Julius Gantman
Attorney for

JULIUS GANTMAN
ATTY. FOR DEFDT.

(over)